

RECEIVED

DOCKET FILE COPY ORIGINAL

JAN 12 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Rules Governing Procedures to be
Followed when Formal Complaints
are Filed against Common Carriers

CC Docket No. 96-238

**Comments of ATU-LD on Public Notice Regarding
Accelerated Docket for Complaint Proceedings**

ATU-Long Distance (ATU-LD) supports and endorses the interest of the Common Carrier Bureau in introducing live evidentiary hearings ("mini-trials") as a means of resolving formal complaints.¹ Such hearings would facilitate the resolution of complaints, regardless of whether complaints are decided on an accelerated track.

ATU-LD is a certificated Alaska-based long distance carrier which in late 1996 began business carrying toll calls within Alaska and to other states and countries. ATU-LD is primarily a reseller, and is the Complainant in an ongoing formal complaint, File No. E-97-49, which concerns capacity over the only fiber-optic cable between Alaska and the rest of the United States.

These Comments are organized by the issue numbers stated in the Public Notice.

Issue 2. The Common Carrier Bureau's statement that "a hearing type procedure ... would likely permit closer inquiry into factual issues and more effective credibility determinations than are on possible on a paper records" is correct. (Public Notice, issue 2). In a hearing-type procedure:

- The decision-maker listens directly to the witnesses, rather than through the filter of affidavits drafted by counsel.

¹See "Common Carrier Bureau Seeks Comment Regarding Accelerated Docket for Complaint Proceedings", DA 97-2178, Released December 12, 1997.

No. of Copies rec'd
List A B C D E

024

- Through the give and take of live questioning, counsel can effectively inquire into the other side's position on fact issues, especially technical issues. Counsel can use follow-up questions to get to the heart of the matter. Drafting interrogatories on technical issues is extremely difficult, given the lack of opportunity for follow-up and the knowledge that opposing counsel can, if they wish, scrutinize questions for ambiguities and other "outs."
- Commission decision-makers will have the option of asking questions directly to the witnesses. Due to the tight ex parte contact restrictions applicable to formal complaints, such questioning is not feasible absent a hearing. The Commission decision-makers can probe counsels' position in a flexible manner, as in any oral argument.
- Win or lose, the parties will have the opportunity to present their case to the decision-maker face-to-face. Formal complaints are a form of litigation. Allowing the parties their "day in court" will provide a considerable intangible benefit to the complaint process.

Everyone of the above-listed benefits applies whether the Commission resolves the formal complaint on the five-month schedule mandated by 47 U.S.C. Sec. 208 for many complaints or the extremely ambitious 60 day "accelerated" schedule discussed in the Public Notice.

Issue 4. The Bureau sought comment "on whether, or in what circumstances, previously filed complaints should be designated for inclusion on the Accelerated Docket." While an existing complaint could not be resolved from start to finish within 60 days, the benefits of a live evidentiary hearing, including faster resolution of the case, can and should be realized.² As long as the parties have not filed briefs on the assumption that briefing would be the only form of presenting their cases, pending cases will often be excellent candidates for mini-trials. Using mini-trials to resolve pending cases avoids the need to immediately develop specialized start-to-finish procedures (covering pre-

²Mini-trials will speed up resolution of existing cases. At the very least, if the hearing takes place at or about the time opening briefs would have been due, the reply briefing period (and expense) is eliminated. Additionally, where the evidence or law is not overly complex, the decision-maker presiding at the hearing could rule at the conclusion of the evidence, with the transcribed oral opinion (accompanied by a short written order stating the result) substituting for the traditional written opinion.

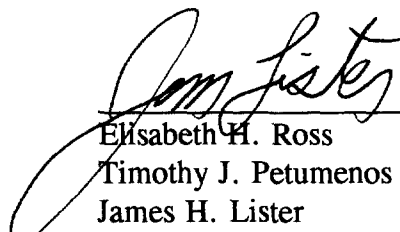
filing coordination, pleading, discovery, etc.) which will be much more complex than the procedures for the hearing itself. In fact, rather than trying to implement both a 60 day schedule and a hearing process in one step, the hearing process should be tested first with existing cases.³

A second part of issue four is the mechanism for selection of cases. The Public Notice contemplates a request by the Complainant, followed by Staff consideration as to whether to grant the request. At least until such time as both parties have the option of selecting the mini-trial process, this is the proper procedure. The alternative, requiring both sides to consent to the request, will not work, as it will generally be in the interest of one party to confine the case to the traditional paper process.

Dated this 12th day of January, 1998.

Respectfully submitted,

ATU-LD, INC.



Elisabeth H. Ross
Timothy J. Petumenos
James H. Lister
Birch, Horton, Bittner and Cherot
1155 Connecticut Ave., N.W., #1200
Washington, D.C. 20036
(202) 659-5800
Attorneys for ATU-LD, Inc.

³ATU-LD is drafting a motion for filing its formal complaint case, E-97-49, requesting that the complaint be decided by the mini-trial process. That motion will detail the benefits a mini-trial would offer both in the resolution of that particular complaint and as a testing ground for the mini-trial process.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this 12th day of January, 1998, I caused true copies of the forgoing Comments to be hand delivered to or deposited in the U.S. mail, first class and postage prepaid, addressed to:

Jeffrey H. Dygert, Esq.*
Common Carrier Bureau Enforcement
Division
Room 6120
2025 M. Street, NW
Washington, D.C. 20554

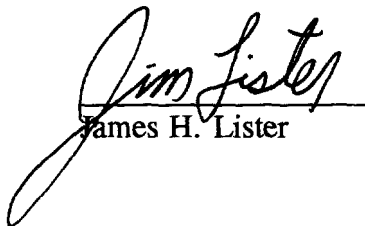
Enforcement Task Force#
Office of the General Counsel
FCC, Room 650-L
1919 M Street, NW
Washington, D.C. 20554

Enforcement Division#
Common Carrier Bureau
FCC, Room 6120
2025 M Street, NW
Washington, D.C. 20554

International Transcription Services, Inc.
1231 20th St., N.W.
Washington, D.C. 20036

Ava. B. Kleinmann, Esq.+
Jodie Donovan-May, Esq.
AT&T Corp.
Room 3252J1
295 North Maple, Ave.
Basking Ridge, NJ 07920

Kurt A. Schroeder, Esq., Chief+
Sumita Mukhoty, Esq.+
Formal Complaints and Investigations Branch
Enforcement Division
Common Carrier Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 6120
Washington, D.C. 20554



James H. Lister

* With copy on disk in WordPerfect 5.1 format

Two copies

+ Courtesy copy to Counsel and Staff in Formal Complaint E-97-49